NO. 83-5573

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

CHARLES YOUNG,

Appellant

V.

THE STATE OF TEXAS,

Appellee

On Appeal From The Texas Court Of Criminal Appeals

APPELLEE'S MOTION TO DISMISS OR AFFIRM

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Texas Court of Criminal Appeals.

OPINION BELOW

The opinion of the Texas Court of Appeals for the Second Supreme Judicial District is reported at 629 S.W.2d 247 (Tex.Ct.App. 1982), and is annexed as Appendix A to Appellant's Jurisdictional Statement. The unpublished order by the Texas Court of Criminal Appeals dismissing the Petition for Discretionary Review is annexed as Appendix B to Appellant's Jurisdictional Statement.

STATEMENT OF JURISDICTION

The Texas Court of Appeals sustained the constitutionality of Tex. Code Crim. Proc. Ann. art. 38.13 (Vernon) in affirming

Young's conviction on February 24, 1982. The Texas Court of Appeals subsequently overruled Young's timely filed motion for rehearing on March 24, 1982. Young timely filed a Petition for Discretionary Review with the Texas Court of Criminal Appeals, which was dismissed on July 20, 1983. Young filed his notice of appeal to the United States Supreme Court on September 2, 1983. The jurisdiction of this Court is pursuant to 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISION INVOLVED

The due process clause of the Fourteenth Amendment to the United States Constitution.

STATUTORY PROVISION INVOLVED

Art. 38.13, Tex. Code Crim. Proc. Ann. (Vernon), which provides as follows:

> The trial judge is a competent witness for either the State or the accused, and may be sworn by the clerk of his court and examined, but he is not required to testify if he declares that there is no fact within his knowledge important in the case.

STATEMENT OF THE CASE

A. Course of proceedings and disposition in court below

Respondent has custody of Young pursuant to a judgment and sentence of the 78th District Court of Wichita County, Texas, in Cause No. 18,001-A, styled The State of Texas v. Charles Young. Young was charged with the first degree felony offense of aggravated robbery, to which he entered a plea of not guilty. Young was tried by a jury, which on September 20, 1978 found him guilty of the offense charged in the indictment and assessed punishment at confinement in the Texas Department of Corrections for seventy-five years. An appeal was perfected to the Texas Court of Criminal Appeals. The case was subsequently transferred to the Court of Appeals for the Second Supreme Judicial District, which rendered a decision on February 24, 1982, affirming the conviction. Young v. State, 629 S.W.2d at 247. Following the denial of a Motion for Rehearing, Young filed a Petition for Discretionary Review with the Texas Court of Criminal Appeals, which was overruled on July 20, 1983 (No. 311-82).

B. Statement of Facts

At the sentencing stage of the trial, the State offered evidence that Young had been convicted on two prior occasions and had received a probated sentence on each. First, the State offered into evidence the indictment, judgment and judgment of probation from Young's two prior convictions, both in the 78th District Court of Wichita County, Texas (State's Exhibits 29, 29A, 29B, 30, 30A, 30B). Shirley Schroeder, a deputy in the District Clerk's office of Wichita County, testified that the court documents were business records, and that the person convicted of both prior offenses was Charles Young (SOF Vol. V at 5-12). The instant case was decided in the 78th District Court of Wichita County, Texas, and the presiding Judge was the Honorable Stanley C. Kirk, the same judge who had presided over both of Young's prior convictions. To prove that the Charles Young who was convicted in the prior offense was the same person who was then on trial, the State offered the testimony of Judge Kirk, the presiding judge. Judge Kirk took the witness stand, was sworn, and testified solely to the fact that the Charles Young who was presently on trial was the same person who had been convicted for the prior offense (SOF Vol. V at 13-16).

MOTION TO DISMISS

Pursuant to Sup.Ct.R. 16.1(b), the appeal should be dismissed because it fails to present a substantial federal question. Although the provision contained in art. 38.13, Tex. Code Crim. Proc. Ann. (Vernon) has been the law in Texas for nearly sixty years, see art. 717, former Tex. Penal Code (1925), the claim Young presently raises has been presented to the Texas courts on appeal on only two prior occasions, the most recent in 1964. Fernandez v. State, 382 S.W.2d 935 (Tex.Crim.App. 1964); O'Neal v. State, 291 S.W.2d 892 (Tex.Crim.App. 1927). In addition, in the two other states which presently have similar

provisions, Idaho and Tennessee, [1] the statute has been considered on appeal a total of three times in Tennessee, [2] and never in Idaho. Because of the infrequency in which statutes such as this are applied, this issue is not so substantial as to warrant further consideration from this Court.

That this appeal should be dismissed is further shown by a review of the merits of Young's claim. The principles for reviewing alleged violations of due process under the Fourteenth Amendment are well settled. Although the standard of review has been stated in various ways, see, e.g., Duncan v. Louisiana, 391 U.S. 145, 149 (1968), the test which is most appropriate in the context of the present claim is whether the Texas statute violates a fundamental right which is essential to a fair trial. Id.; Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963); Malloy v. Hogan, 378 U.S. 5, 6 (1964). A number of reasons are given for precluding a judge from testifying at a trial over which he is presiding, including the problem of who rules on objections or compels the judge to testify, the problem of impeaching or cross-examining the judge effectively, and, in a jury trial, the problem that the jury might believe the judge favors one side. See Fed.R.Evid. 605, Notes of Advisory Committee; 6 Wigmore, Evidence §1909 (J. Chadbourne 1976). The drafters of the federal rules resolved these problems by providing that "[t]he judge presiding at the trial may not testify in that trial as a witness." Fed.R.Evid. 605. The fact that the drafters of the federal rules chose to exclude the presiding judge's testimony does not compel the conclusion that testimony by the judge automatically renders a trial fundamentally unfair. As noted by Wigmore:

1/ See Idaho Code §9-204 (1979) anf former Idaho Code §9-204 (1948); Tenn. Code Ann. §24-1-205 (1980) and former Tenn. Code §24-107 (1955).

2/ Bowman v. State, 598 S.W.2d 809 (Tenn.App. 1980); State v. Henderson, 423 S.W.2d 489 (Tenn. 1968); Leighton v. Henderson, 414 S.W.2d 419 (Tenn. 1967).

> There is a modicum of truth in all these objections. Yet is it necessary on that account to lay down a universal prohibition? The force of the objections would rise to an appreciable degree only when the judge became a principal witness -- as in the case put by King Henry IV, where the judge had been an eyewitness of a murder. In all such instances (which are rare enough), the usefulness of his testimony would be known beforehand, and his own discretion and the parties' could be trusted to send the cause before another judge for trial. But in the ordinary instance the judge's testimony is desired for merely formal or undisputed matters, such as the proof of execution of a certificate or of the administration of an oath or of a deceased witness' former testimony. To suppose here a danger that the inconveniences above noted would occur in any appreciable degree is to be unduly apprehensive. Military commanders do not train cannon on a garden gate; and the law of evidence need not employ the cumbrous weapon of an invariable rule of exclusion to destroy an entire class of useful and unobjectionable evidence in order to avoid embarrassments which can easily be dealt with when they arise.

6 Wigmore, Evidence §1909 (J. Chadbourne 1976). See also, Morgan, Basic Problems of State and Federal Evidence 79 (J. Weinstein 5th ed 1976); Model Code of Evidence Rule 302 (1942). In fact, the Texas Court of Appeals construed the statute strictly, making the problems which Young complains of virtually nonexistent. The Court wrote that art. 38.13, Tex. Code Crim. Proc. Ann. (Vernon) "is a rule of procedure which should be used only in extremely rare circumstances and only then in such a manner as to not put the judge in the position of an advocate . . ." and that "the application of this statute should be limited to judicial or clerical facts within the certain knowledge of the trial judge." Young v. State, 629 S.W.2d at 250. Therefore, as construed by the Texas Court of Criminal Appeals, art. 38.13 does not render a trial fundamentally unfair.

MOTION TO AFFIRM

Pursuant to Sup.Ct.R. 16.1(d), the judgment should be affirmed because the error, if any, is harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18 (1967). Young first argues that it was unfair for the presiding

judge to vacate the bench and testify from the witness chair, because there was nobody present to rule on objections. The record discloses, however, that no objections were made to the judge's testimony, other than to the fact that the judge was giving testimony. Because the testimony which the judge gave was unobjectionable and no objection was made, Petitioner has not been harmed by this alleged error. Young also argues that by testifying, the judge gave the impression to the jury that he was partial to the state. In the instant case, however, the judge merely testified to the uncontested fact that Young had twice previously been convicted of other offenses (SOF Vol. V at 13-16). This testimony, which was presented at the sentencing stage of the trial, was not of such a nature as to indicate to the jury that the judge favored either side. In addition, although the jury was not required to believe the testimony of any witness, it is extremely unlikely that the jury would disbelieve the uncontradicted testimony by a judge, whether he was the presiding judge or not. The fact that the witness to Young's prior convictions was also the presiding judge is therefore not a factor in the jury's decision. The testimony by the judge was thus harmless beyond a reasonable doubt.

CONCLUSION

For these reasons, Respondent respectfully prays that the cause of action herein be dismissed, or in the alternative, that the decision of the court below be affirmed.

Respectfully submitted,

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